The following cases, decided at the last term, support the jurisdiction of this court in this case; *Sweringen v. St. Louis*, 185 U. S. 38, 45-46; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290; *Patton v. Brady, Exr.*, 184 U. S. 608; *Howard v. United States*, 184 U. S. 676, 680.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,

Appellant,

vs.

J. A. SODERBERG,

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The appellee has moved to dismiss this appeal on the ground that the decision of the circuit court of appeals is final.

Section 6 of the act of 1891 (26 Stat. 826) provides as follows:

> "That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error

> final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases. * * * * * * * *
>
> "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

It is clear that in cases where the jurisdiction of the circuit court depends *entirely* upon diversity of citizenship the decision of the court of appeals is final. In cases where it is apparent from the bill or declaration that the plaintiff's right arises directly out of an act of congress and depends on the interpretation of such act, the decision of the circuit court of appeals is not final, but an appeal or writ of error lies to this court. The fact that the jurisdiction of the circuit court might have been sustained upon diversity of citizenship will not render the decision of the court of appeals final, if the bill or declaration presented a federal question giving the circuit court jurisdiction without regard to the citizenship of the parties. The single question presented therefore by the motion to dismiss is, whether the circuit court would have had juris-

diction if the allegations of diverse citizenship had been omitted.

The bill alleges title in the complainant under the grant to the Northern Pacific Railroad Company by act of congress of July 2, 1864. It is shown that by that act alternate odd-numbered sections of non-mineral public land on each side of the railroad within specified limits were granted, excepting however, those lands which were subject to claims, or which had been reserved, at the date of definite location; that the premises in controversy are part of an odd section within the granted limits and were free from claims and not reserved at the date of definite location. It is alleged that the premises are rough mountainous land and their principal value consists in the existence thereon of a ledge of granite of good and merchantable quality and of considerable value; that under the true construction of the congressional grant such lands are non-mineral and included within the conveyance made by the act. The bill charges, that by virtue of certain mineral locations of the premises under the acts of congress for the granite theron the defendant claims title and claims that because of the granite the lands were mineral and so excepted from the grant made by congress in the railroad act. The bill prays an injunction restraining the defendant from quarrying and removing the granite.

It appears that the complainant has no patent to the premises and its whole title to the land and its right to the relief sought depend upon the interpre-

tation and effect to be given to the grant. The question presented by the bill is whether land chiefly valuable for granite is "mineral" within the true meaning of the grant.

Nothing can be clearer than this; if the plaintiff's title arises directly from an act of congress, and if the question involved depends on the construction of the act, the case is one arising under the laws of the United States.

In *Cooke v. Avery*, 147 U. S. 375, this court sustained the jurisdiction of the circuit court on the ground that the case arose under the laws of the United States. The action was in trespass and was brought in the circuit court for the northern district of Texas. The plaintiff in his petition set forth that he and the defendants derived title from one P. as a common source; that the defendants deraigned title from a deed by P. and wife while plaintiff claimed title under an execution sale upon a judgment recovered against P. in the circuit court of the United States for the northern district of Texas before the execution of the deed from P. to the defendants. The petition further alleged that by reason of certain laws of the United States and rules of the circuit court, which were specifically referred to, the judgment was a lien on the property in question from its rendition and continued to be a lien up to the date of the execution sale, by reason whereof plaintiff had a superior title to the property, but that defendants denied that the judgment was ever a valid lien under said laws and rules.

The court said (p. 384):

> "Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States."

The court continued (p. 390):

> "It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien, which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject matter was properly invoked."

Spokane Falls, etc. Ry. Co. v. Ziegler, 167 U. S. 65, was a case which came to this court on writ of error to the circuit court of appeals. The action was commenced by Ziegler, a citizen of Washington, in the superior court for Spokane county, Washington, against a Washington corporation and was removed on petition of the defendant to the United States circuit court. A judgment for Ziegler was affirmed by the circuit court of appeals.

In this court the railway company sought to have the judgment reversed with directions to remand the case to the state court, upon the ground

that the circuit court was without jurisdiction. This court said (p. 72):

> "In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a pre-emptor under the laws of the United States, of a tract of land containing about eighty acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the Territory of Washington, on said date entered upon and seized a strip of said land fifty feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.
>
> We have judicial knowledge that the authority of the Territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled 'An act granting to railroads the right of way through the public lands of the United States,' approved March 3, 1875, 18 Stat. 482, whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any State or Territory.
>
> The plaintiff's complaint, therefore, discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the Circuit Court for the District of Washington clearly had jurisdiction. *Doolan*

v. Carr, 125 U. S. 618, 620; *Cooke v. Avery*, 147 U. S. 375."

See also *Doolan v. Carr*, 125 U. S. 618.

It is urged by the appellee that, although a federal question may be presented by the allegations of the bill, under which the complainant shows that its right to the relief sought depends upon the construction of the laws of the United States, nevertheless the force of these averments is destroyed by the allegation that the character of the land as mineral or non-mineral has not been determined by the interior department.

But this is not one of those cases where it is necessary for the courts to await the finding of the interior department on a disputed question of fact; for in this case the facts are not disputed; the character of the land as alleged in the bill is admitted in the answer and was stipulated on the trial; the whole question is one of law, viz., whether land containing merchantable veins of granite is mineral under the Northern Pacific grant.

In *Northern Pacific Railway Company v. Myers*, 172 U. S. 589, this court held that lands within the place limits of the Northern Pacific grant, which are in fact non-mineral, are subject to taxation by specific description before the mineral or non-mineral character has been determined by the interior department. This decision was reached upon the ground that the full beneficial interest passed to the company upon the fixing of the granted limits by definite location. That the legal title

and the full beneficial interest in lands in fact non-mineral passed upon definite location and before the issuance of patent and before the determination of the fact by the interior department was decided in the Myers case upon the authority of *Deseret Salt Company v. Tarpuy,* 142 U. S. 241, 316, where the right to maintain ejectment was sustained.

But a conclusive answer to this suggestion is that it is not a point which goes to the *appellate jurisdiction of this court*: it relates only to the jurisdiction of the *circuit court.*

It is submitted that the motion to dismiss the appeal should be denied.

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